

February 1995

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Recommended Citation

Strauch, Katina (1995) "Interview with Joseph S. Alen," *Against the Grain*: Vol. 7: Iss. 1, Article 11.
DOI: <https://doi.org/10.7771/2380-176X.1682>

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Interview with Joseph S. Alen

President and CEO, Copyright Clearance Center

by Katina Strauch (College of Charleston)

With the Texaco decision (see this issue, page 1), we thought it would be interesting to talk with Joseph Alen of the Copyright Clearance Center (CCC.) Mr. Alen cleared his calendar to talk to us earlier last month. Here is what he told us. — KS

ATG: Everyone seems to be talking about the CCC after the Texaco case. Can you give us some background on the CCC? How did it get started? How has it evolved since its creation?

JSA: The Copyright Clearance Center was started in 1978 in response to a revision in the copyright law. The 1976 Copyright Act (which became effective January 1, 1978) clarified the rights of copyright holders, especially with respect to the new technologies of that era such as photocopying. During passage of the Copyright Act, Congress suggested that the private sector create a mechanism to facilitate compliance with the reprographic rights as defined in the new law. As a result of this Congressional suggestion, authors, publishers and users worked together to form CCC.

CCC began by licensing photocopying on a transactional basis. This first system was designed by information specialists on loan from the Exxon Corporation, to help develop the CCC. Under this early system, users determined which photocopying transactions required the payment of royalties. The user would then report those transactions via a log sheet to CCC. CCC would aggregate all of the reports, send a monthly invoice to the user, collect the payment and then distribute the total collections to the appropriate rightsholders. This original system of self-reporting is still in operation as the Transactional Reporting Service (TRS), and many academic libraries and document supply centers rely on the TRS to fulfill their copyright compliance requirements.

But some of our corporate users requested that we develop additional licensing systems that could reduce some



of the administrative work associated with the TRS. So CCC began to work with a group of MIT and Harvard econometric experts to create a new licensing approach based upon sampling techniques similar to those used by other collecting societies such as ASCAP. Rather than requiring clients to report every royalty-related photocopy transaction, the new approach was based upon taking a sample of photocopy activity at photocopy machines in each user com-

“... permission of the rightsholder is required for archival photocopying of copyrighted materials ...”

pany, aggregating the results by industry and using them to estimate an individual corporation's photocopying activity. Although the statistical model is technically somewhat complex, compliance with the actual licensing system was easy for CCC's corporate users. Using the industry averages and the prices set by the rightsholders, CCC was able to calculate a single, annual license fee for each user organization. By payment of this annual fee, the corporation would be

authorized to copy from any of the titles registered with CCC. And CCC could also use the same statistical samples to equitably distribute the license fees collected under this system. This corporate licensing program is called the Annual Authorizations Service (AAS), and it is the system selected by most of our corporate clients, including 75% of the Fortune 100 companies.

Then, when the Kinko's decision came down, CCC was inundated with requests from both copyshops and publishers to create a licensing system for academic coursepacks. We developed a centralized system for the conveyance of rights and royalties related to the production of coursepacks, called the Academic Permissions Service (APS). Rightsholders authorize CCC to grant permissions for the use of their works, and after the coursepacks have been created and sold, the producer reports the sale and pays the appropriate royalties to CCC. CCC collects the APS royalties and then distributes them to the appropriate rightsholders.

CCC's licensing programs will continue to evolve as new needs arise. Right now, at the request of our academic users and rightsholders, we are trying to define comprehensive reprographic licensing programs that could be used by universities, as well as licensing systems that authorize networked digital access to copyrighted materials.

The university license will have to offer a broad range of materials, accommodate the unique considerations of fair use in an academic environment, and be simple to administer. We piloted a University License at six different institutions several years ago. That data, plus current experience with the 1000 Academic Permissions Service customers and the 400 college and university libraries we serve through the TRS, have helped us understand the needs.

ATG: Can we talk for a minute about the Texaco case and the impact of the case on the CCC? Was the journal at

issue a CCC title and was the CCC a party to the case?

JSA: The Texaco case is surrounded by all sorts of misconceptions. CCC was not a party to the case. The suit was brought as a class action by a group of publishers. All of these publishers had registered their works with CCC. The case raised a series of potentially distracting issues, so Texaco and the publishers agreed that they would initially try the core issue: fair use. The parties put forward facts related to the photocopying by one Texaco researcher of eight articles out of different issues of the *Journal of Catalysis*. Because the publishers had registered their titles with CCC, including the *Journal of Catalysis*, and the relief sought encompassed Texaco's making appropriate license payments to CCC, the parties asked CCC to provide information concerning our licensing systems. I gave a two day deposition and submitted affidavits describing CCC and the systems we had in place at that time for licensing photocopying. But CCC did not formally participate in any court filings or submit any amicus briefs to either the trial or appellate court.

When the original trial court opinion was issued, CCC was mentioned fairly extensively by Judge Leval, citing it as one of the copyright compliance options which Texaco could have used. The appellate court also explicitly endorsed the licensing market created by CCC in its affirmation of the trial court's decision. I think that Texaco will have a significant impact on copyright compliance. A number of corporations decided to take a CCC license after the trial court decision. Other corporations took a "wait and see" attitude while the case was on appeal. Now that the appellate court has affirmed the decision, I think we are likely to see more corporations using CCC services in their compliance programs. Of course, corporations have to digest the opinion. It will take a bit more time for the decision to percolate through the corporate structure and for CCC to see significant impact on its licensing activity. I think the opinion is clear, though, that the permission of the

rightsholder is required for archival photocopying of copyrighted materials in these kinds of corporations.

ATG: The Texaco opinion discusses the concept of fair use at length. Does the opinion help reconcile the sometimes divergent views of publishers and users

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as to what is and what is not fair use?

JSA: Oh, I think the opinion is clear that some types of copying just aren't covered under the concept

of fair use. Certainly the archival copying that was the subject of the Texaco lawsuit is not covered under fair use.

But, the Texaco decision doesn't directly address many types of copying that must be analyzed and dealt with on their own terms. I think an interesting case might be academic library photocopying. It's clear that either under the fair use or library exemptions of the Copyright Act, some significant portion of such photocopying is permitted. But, what about a library that is really engaged in a document delivery service that generates income? Such a service looks nearly identical to and seems to compete with the activity of a for-profit commercial company.

Publishers and the AAP have issued a statement about such academic library document supply. They say that it should be treated the same as commercial operations and that fair use should not apply.

CCC does not take a position on such activity, although as a licensing organization we would welcome clarification. Libraries can seek permissions and report their photocopying through CCC, but CCC leaves it up to the librarian to determine when such reporting and royalty payment is necessary. Different libraries interpret the law differently. Some librarians think it is easier to work through CCC

"CCC does not take a position on [academic library document supply]."

than to enforce internal compliance policies, deal with numerous rightsholders or take the risks associated with non-compliance.

ATG: Are there many libraries that use the CCC? I thought that CCC was used primarily by large corporations, businesses, and copyshops, not libraries and universities?

JSA: A growing number of libraries use CCC services. Most libraries are reporting small amounts of photocopying, but using CCC still offers efficiencies over dealing with even a small number of rightsholders. Most of the activity from libraries and universities comes from the making and distribution of coursepacks and this activity can be reported by campus bookstores, print centers, academic departments, or commercial copyshops.

Also, CCC has historically had a greater number of scientific publishers registered. Those types of publications seemed to better reflect the type of photocopying license base that corporations needed. But, the academic environment's need is more diverse. We are expanding coverage beyond scientific/business publishers in response to the requests from libraries and universities. We are currently increasing our registered titles by 20% about every six months. At some point we hope to have most of the requested titles registered.

ATG: I have heard that CCC has been accused of slow payment of royalties to publishers. In looking over your annual report, I noticed significant increases in CCC revenues from 1992 (\$12,200,000) to 1994 (\$24,900,000). And CCC has also increased annual disbursements to rightsholders from \$6,600,000 to over \$18,400,000 during this period. How do you account for what appears to be a misconception by some publishers as to CCC's ability to generate and distribute significant royalties?

JSA: In fairness, it did take several years for CCC to become fully operational. Unlike our foreign counterparts that function under national statutes that

give them the right to license almost 100% of published titles from the day they open their doors, CCC operates on a con-

tractual system. It took some time for CCC to register enough rightsholders to offer a full repertoire of titles.

Today, under a strictly voluntary, free-

market system, CCC offers users authorization to photocopy from over 1.7 million titles published by 9,000 publishing houses from around the world. Those authorizations are based upon prices set individually by the rightsholder. Despite the work required to accurately collect and pay royalties on millions of photocopy transactions each year, we pay rightsholders all of their royalties within a year after collection. Although to some big publishing houses the royalties we distribute are small by comparison with other revenues, they can nonetheless be quite significant; this has certainly been the case for many medium and small publishers, especially academic publishers with limited circulation.

*ATG: Why wouldn't a publisher work with the CCC? Sometimes I have corporations ask me if I deal with CCC for photocopying of *Against the Grain*. It makes me laugh. You don't care about a publication like ATG, do you?*

*JSA: *Against the Grain* isn't registered with CCC? I'll send you a contract right away!*

CCC is interested in all publishers. While we started with a heavy representation of scientific, technical and medical publishers because of the interests of our early corporate clients, CCC has continued to expand its efforts to register newspapers, trade magazines, and newsletters. We are currently dealing with an average of ten new publishers a day.

"We want to be part of a system that offers fair access to users, fair remuneration to rightsholders, and insures the privacy rights of all parties."

There is an amazing amount of photocopying that goes on. In addition to our annual programs that survey corporate photocopying, CCC has days when we process over 5,000 individual photocopy transactions.

If people want to share the information that's contained in your publication, chances are it's being photocopied. Registering with CCC just insures that you will get compensated for these photocopy uses as well as for the subscription uses.

Of course some publishers don't participate because they have not acquired the right to do so from their authors. The publisher's agreements with its authors must be clear that the publisher can grant reproduction rights to CCC.

ATG: Now that's a good topic. How about the authors? Do you deal with any authors and do they ever get any money from you? Have you noticed a trend of authors to take copyrights away from publishers and/or to assign them to universities?

JSA: Most of our contracts are with publishers because most authors have agreed by contract with the publishers that the publisher is to exploit the copyright. CCC does not interpose itself into these publisher/author contracts. We rely on the publishers to make payments to their authors in accordance with their contracts. We are now encouraging our publishers to itemize in their royalty statements to authors the monies collected on their behalf by CCC. To do this the publishers will have to change their in-house royalty reporting software systems, so it's going to be a gradual process.

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universities rather than publishers is interesting. University presses are significant publishers. In fact, **Sandy Thatcher** (Penn State Press and a CCC Board member) just wrote an article in support of universities exercising copyrights assigned to them as a way to finance the short-run scholarly publications that are so influential, but which have a hard time breaking even on subscription sales. I would guess that for some of these university titles, the royalties collectable from photocopy activity would equal or exceed their revenue on subscriptions. Based on our experience and the logic of the circumstances, though, we do not believe that a workable, cost-effective licensing system can be developed if all authors retain their copyrights.

ATG: Where do publishers' in-house rights & permissions departments fit in?

JSA: Trade houses have their own rights and permissions departments, and CCC works with these departments. CCC has advantages, though. By collectively licensing millions of titles, we have economies of scale that even the largest publishing houses would have a hard time achieving.

And, as a user, what would you rather do if you had a consistent need to photocopy articles from several publications? Would you rather establish relations and administer contracts with hundreds of different rights and permissions departments, or make one phone call to CCC?

There will always be bilateral agreements between publishers and users of their publications. But, CCC supports the tremendous volume of activity that can be handled more efficiently through its collective licensing program. We want to facilitate legal photocopying of newsletters like *ATG* in just the same way as we facilitate legal photocopying of publications like the *Wall Street Journal*.

ATG: Are there any competitors to the CCC? Who are they?

JSA: There are other mechanisms for

obtaining permissions for reproduction of copyrighted materials. A user can contact the rights and permissions staff of the publisher, obtain materials through reprints or a document supply company, get online access to information, etc. But CCC is the only general access collective licensing organization for the U.S. publishing industry.

ATG: We understand that legal publishers are generally not represented by the CCC? Is this true?

JSA: "Legal publishers" is a somewhat generic term. CCC's repertory includes a variety of publishers who focus on legal materials: BNA; Little, Brown; Matthew Bender; Martindale-Hubbel; Warren, Gorham, and Lamont; Research Institute of America; and a number of legal newsletters. And, of course, a lot of "legal photocopying" is from general circulation periodicals like the *Wall Street Journal* or *Financial World* which are registered.

ATG: Tell us a little more about CCC. How many people work at the CCC? Are you a for-profit corporation?

JSA: We currently have about seventy people on staff. We have five different departments: systems services; our publishers/rightsholders representatives; our staff that handle coursepacks and transactional activity; sales and marketing; and general corporate.

We deal with technical issues. People call and ask us lots of questions: do you license this type of activity or can you give me a contact at a publishing house for reprints, etc.

And, of course, selling a license to a corporate user can take some time for each company. Frequently the licensing decision is made at the top of the organization, even at the board level. There are exchanges of letters with the president of the corporation, exchanges of letters with the general counsel, chief patent attorney or intellectual property lawyer, phone conversations, visits by account representatives, licensing correspondence, etc. The decision to sign up for the first time is a big one for some.

As to our organizational structure, we are a not-for-profit organization. We have no shareholders and we retain no profits. A portion of collected money pays our operating expenses and all the rest is distributed directly to rightsholders. We

have a 17-member board of directors composed of publishers, authors, and users. In this respect, CCC is unique among the world's Reproduction Rights Organizations (RROs) [RRO is the generic term for national collective licensing bodies for reprography.]

ATG: You mentioned before that you deal with organizations in other countries that are similar to CCC. Tell us a little more about the international environment.

JSA: CCC is one of over 20 international RROs around the world. Through bilateral agreements and participation in the International Federation of Reproduction Rights Organisations (IFRRO), CCC also links rightsholders and users to the repertoires of these foreign RROs in order to address the globalization of information resources. These agreements also allow CCC to repatriate funds collected on behalf of U.S. rightsholders by the foreign RROs, and to distribute them to the rightful U.S. rightsholder.

Although all IFRRO bilateral agreements are based on the Berne Convention principle of "national treatment", other countries have statutes governing their RROs rather than being based upon contracts like CCC. In Germany, for example, a licensing system is based upon a levy that is placed on each photocopy machine. The levy is paid to the RRO by the manufacturer of the photocopy machine. It works like the digital audiotape (DAT) levy in the United States.

ATG: Will there be a need for the CCC as we move toward the digitized environment? Is CCC doing anything in the digital area?

JSA: As the world moves toward electronic storage and dissemination of full-text printed materials, I believe the need for the CCC will be even greater.

Since 1988, CCC has been testing elec-

tronic licensing through pilot programs in the telecommunications, manufacturing, and petrochemical industries. So we feel like we can begin a fully operational program with a lot of experience already "under our belt". For example, during

"People don't have a good sense of the value of intellectual property."

the pilots we kept hearing the phrase "the answer to the machine is in the machine". Roughly translated, this meant that technology, like truth, will set you free. And of course, part of the answer to the problems associated with digital use is in the technology that is used. But, there are a broad range of concerns and issues that technology just can't adequately address, for example, the confidentiality issue. There are already reports of some Internet service providers accumulating and selling usage information about their customers. Wouldn't you rather your usage of digital services remain confidential? Most corporations would, especially if that usage information might reveal strategic research and development plans.

CCC has brought these concerns to the table at the NII hearings. We want to be part of a system that offers fair access to users, fair remuneration to rightsholders, and insures the privacy rights of all parties.

ATG: You are a lawyer. Are there other lawyers at CCC? Can you tell us a little about yourself, personally.

JSA: I am a lawyer. I was in the military after law school and spent time in Vietnam and Europe. I was Director of Local Governmental Programs at the University of Massachusetts for a number of years, and then did international consulting. Then I finally found the CCC in 1981, and it was love at first sight.

After a three-hour interview by CCC's then President, he asked if I would be interested in the job (Manager of Licensing and International Agreements). I said, "I subscribe to 75 periodicals and have a personal library of 4,000 books; I was born to do this."

You have to care about information, writing and publishing to work for CCC. We are also involved in an area of the law that is exciting, intellectually challenging, and delightful. But it is also practical — we're not just dealing with abstract principles.

I started working for CCC on the corporate licensing program, with responsibility for developing the licensing methodologies with the econometricians and working on the development of publisher and user contracts. I also worked on bilateral foreign agreements and the repatriation of royalties from foreign RROs.

Work is my hobby. I work 60 to 70

hours a week. I like being on the cutting edge of digital technology and doing socially beneficial and productive work. I help authors to author and publishers to publish. The work can be frustrating and extremely challenging, but it is wonderful — I wouldn't want to do anything else.

We have an attorney who serves as Counsel for in-house matters and who works directly with our outside counsel, Weil, Gotshal & Manges. We also have a few attorneys in our corporate licensing staff because we find this makes explanations and communications with corporate counsels a little easier.

ATG: Coming from academe as I do, it seems to me that we are moving toward an environment where people don't respect copyright. As a librarian, I can understand the zeal to share information; but as an aspiring author and publisher, it scares me. I feel like we are on a juggernaut that is out of control.

JSA: At this stage it should scare everyone. People don't have a good sense of the value of intellectual property. Both rightsholders and users have occasionally exaggerated their positions. Many in academe are caught in a conflict because they wish to support a system of copyright that creates published information, but declining budgets and increased publications create serious cost constraints. And, no one knows how things will turn out.

We may get some comfort and relief from the conclusions of the National Information Infrastructure Task Force on Intellectual Property (who recently published their preliminary work in a Green Paper). The Task Force sees the present copyright system applying in the digital environment (with a few minor changes). Judge Newman, in the appeals court decision in Texaco, advised of the need for a simple, efficient, easy and economical way to deal with information. CCC is part of the solution.

ATG: What does this mean for the future? And even the present?

JSA: The road between here and where we will be in 10 years may be a little bumpy. There will have to be transition mechanisms. People can't wait until the optimal technology is fully in place. They need business solutions today, not next year. And it's not just a

national issue; it's international in scope.

We are facing a situation where American competitiveness in the international environment is increasingly challenged. The U.S. is a net exporter of intellectual property and to the extent that simple licensing is available, we could create the world norm. The kinds of piracy we are seeing now must be reduced or eliminated. We have to be careful as a nation not to encourage "legalized" piracy or give others the impetus to make more expansive interpretations of the Berne Convention. We must help rightsholders protect their intellectual property and help users have lawful access to information. There is a large place for collective licensing in this arena, and we should show leadership in this area. ☞

Joseph S. Alen has been the President and CEO of Copyright Clearance Center since November 1992, having joined CCC in 1981. Prior to his election as President, Mr. Alen served CCC as Vice President since January 1987, with responsibility for general management, strategic planning, international relations, academic licensing activities, and the electronic pilot programs. Before becoming Vice President, Mr. Alen was Manager of Licensing and International Agreements at CCC. He was responsible for the development and implementation of CCC's corporate licensing system and the negotiation of bilateral agreements between CCC and its foreign counterpart organizations. Mr. Alen also served as Secretary General of the International Federation of Reproduction Rights Organizations (IFRRO) from 1988 to 1992, and is currently Vice Chairman. He travels extensively throughout the world on behalf of collective licensing of photocopying and other electronic uses of information. Mr. Alen has authored numerous articles for U.S., U.K. and German publications on this and related topics. He is a graduate of Boston University School of Law and admitted to practice in the Commonwealth of Massachusetts.